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**In The  
Supreme Court of the United States**

**October Term, 1976**

**No. 76-1144**

**MINNESOTA CIVIL LIBERTIES UNION, et al.,**  
*Plaintiffs-Appellants,*

**vs.**

**HOWARD CASMEY, Commissioner of Education  
of the State of Minnesota, et al.,**

*Defendant-Respondents,*

**and**

**LISA GARCIA, et al.,**

*Defendant Intervenors-Respondents,*

**and**

**DAVID and JULAINE WACHHOLZ, et al.,**

*Defendant Intervenors-Respondents.*

**On Appeal from the United States District Court  
for the District of Minnesota**

**JOINT MOTION TO DISMISS OR AFFIRM**

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In The  
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October Term, 1976  
—o—

**No. 76-1144**  
—o—

Minnesota Civil Liberties Union, Americans United for  
Separation of Church and State, Minnesota Education  
Association, Minnesota Association of Secondary School



Principals, Minnesota Association of School Administrators, Minnesota Congress of Parents, Teachers and Students, Minnesota Federation of Teachers, Matthew Stark, Kathleen Hauser, Donald K. Krause, individually and on behalf of the taxpayers of the  
State of Minnesota,

*Plaintiffs-Appellants,*

vs.

Howard Casmey, Commissioner of Education of the State of Minnesota, James Lord, Minnesota State Treasurer, Dorothea Chelgren, David C. Brandon, Henry J. Bromelkamp, Daniel F. Burton, Lorin A. Gasterland, Erling O. Johnson, Ruth A. Myers, Louis R. Smerling, Henry G. Tweten, as members of the State Board of Education of the State of Minnesota,

*Defendants-Respondents,*

and

Lisa Garcia, Christine Garcia and Julie Anne Garcia, minors, by their father and mother and natural guardians, Ernest Garcia and Lupe Garcia, and Ernest Garcia and Lupe Garcia, individually; Robert E. Slater, III, Joseph F. Slater, Susan C. Slater, Thomas S. Slater, Timothy P. Slater, Sheila M. Slater, and Shannon C. Slater, minors, by their father and natural guardian, Robert T. Slater, Jr., and Robert E. Slater, Jr., individually; Donna Wheaton, a minor, by her mother and natural guardian, Emma Hilliard, and Emma Hilliard, individually; and Leigh Ann Spears and Lisa Spears, minors, by their father and natural guardian, William Spears, and

William Spears, individually,

*Defendant Intervenors-Respondents,*

and

David and Julaine Wachholz, individually, and Amy, Michael and Laurel Wachholz, minor children, by their parents and natural guardians, David and Julaine Wachholz; James P. Larkin, individually, and Ann, Matthew, Thomas, Mary, Cecilia, Joan, Eileen, Gregory, John and Margaret Larkin, minor children, by their parent and natural guardian, James P. Larkin; Willis Weiberdink,

individually, and Joan, Jan and Wesley Weiberdink, minor children, by their parent and natural guardian, Willis Weiberdink; Robert E. and Rose Mary Geist, individually, and Robert E., Jr., Rose Mary, Christopher and Larry Geist, minor children, by their parents and natural guardians, Robert E. and Rose Mary Geist,

*Defendant Intervenors-Respondents.*

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**JOINT MOTION TO DISMISS OR AFFIRM**

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Defendant Intervenors-Respondents Lisa Garcia, et al., and Defendant Intervenors-Respondents David and Julaine Wachholz, et al., jointly move the Court to dismiss the appeal, or to affirm the judgment sought to be reviewed on the ground that it is manifest that the questions on which the decision of this cause depends are so insubstantial as not to need further argument.

This Motion is based upon Rule 16 (1) (c) of the Supreme Court Rules and upon the within Brief.

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David and Julaine Wachholz,  
et al.*

## JURISDICTION

This action was commenced in the United States District Court for the District of Minnesota pursuant to 28 United States Code § 1343(3) and 42 United States Code § 1983, the plaintiffs alleging that Chapter 396 of the Laws of Minnesota, 1975 (now codified as Minnesota Statutes § 123.931 through § 123.937), violated the First and Fourteenth Amendments to the United States Constitution by causing an establishment of religion (Complaint, Supplemental Appendix 1). A three-judge court was properly convened pursuant to 28 United States Code § 2284, and a decision rendered. The plaintiffs below filed a timely Notice of Appeal to this Court pursuant to 28 United States Code § 1253.

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## OPINION BELOW

The opinion of the three-judge court is not reported but is set forth in the Appendix to the Jurisdictional Statement at A. 1-16.

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## STATEMENT OF THE CASE

In 1975 the Minnesota Legislature enacted Chapter 396 of the Minnesota Laws entitled "Educational Aids for Nonpublic School Children." The stated secular legislative purpose of this chapter was to "provide for distribution of educational aids such as auxiliary services, instructional materials and equipment so that every school

child in the state will share equitably in education benefits and therefore assure all Minnesota students and their parents freedom of choice in education." Minnesota Statutes § 123.931. There are three operative portions of the Act, namely, the purchase or loan of instructional materials (Minnesota Statutes § 123.933), the purchase and provision or loan of equipment (Minnesota Statutes § 123.934), and the provision of auxiliary services (Minnesota Statutes § 123.935). These statutes are not self-executing but instead require the Minnesota State Board of Education to adopt administrative rules and regulations. Rules have been adopted only with reference to the first statute, namely, that dealing with instructional materials. These rules are known as Minnesota Regulations, Department of Education § 740 through § 742. No rules have been adopted with respect to the other two portions of the Act.

The plaintiffs consist of individuals and groups opposed to any form of assistance to nonpublic school students or nonpublic schools. The defendants consist of the Commissioner of Education of the State of Minnesota and various state public officials who have the responsibility to administer this Act.

Two groups of parents and children were granted permission to intervene. The Lisa Garcia group of intervenors consists of taxpaying parents and their children, all of whom are enrolled in Roman Catholic schools in Minnesota, and all of whom have applied for instructional materials assistance under the Act. The Wachholz group of intervenors also consists of taxpaying parents and their children. These children attend either schools affiliated

with some religious entity other than Roman Catholic or schools that are nonpublic, but have no religious affiliation whatsoever. Similar to the other group, they have applied for instructional materials assistance under the Act.

The three-judge court fully considered the constitutional challenges to the Act, and upheld the constitutionality of the instructional materials statute, Minnesota Statutes § 123.933. Because the other two operative sections of the Act had not been implemented by regulation, the Court did not evaluate them from a constitutional viewpoint. The Court did volunteer, however, that "Because constitutional application may be possible, the Court cannot find them facially unconstitutional." (A. 5).

Because of the similarity of their interests and their desire to expedite this proceeding before the Court, the Garcia intervenors and the Wachholz intervenors have decided to submit a joint motion and brief.

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### QUESTION PRESENTED

The moving parties submit there is only one issue before the Court:

Is a substantial federal question presented by a decision upholding state assistance to nonpublic school students in the form of instructional materials, where the Court below held the statute was not materially different from statutes previously upheld by this Court?

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### ARGUMENT

#### No Substantial Federal Question Is Here Presented.

##### A. The decision below is limited to instructional materials.

Plaintiffs-Appellants have attempted to characterize this case in broad, sweeping terms and have accorded it a degree of application wider than can be remotely possible. They have interjected the auxiliary services and equipment portions of the statute and have even listed their challenge to those portions of the Act as being the third of the "Questions Presented." (Brief, 4).

The plain fact is that the Court below did not pass upon the validity of those two portions of the Act. The Court clearly said, "The only section of the statute at issue here, then, is § 123.933" dealing with instructional materials (A. 5). The comments of Plaintiffs-Appellants on the other two sections of the Act, which have not been implemented, should simply be disregarded.

##### B. The purchase or loan of instructional materials for nonpublic school students is clearly in accord with prior case law.

###### 1. The statute.

The Minnesota Statute upheld by the lower court here, Minnesota Statutes § 123.933, is set forth in the Court's opinion (A. 5) and at A. 22. Paraphrased, it allows the state Board of Education to promulgate rules whereby instructional materials can be loaned or provided by public school districts free to students enrolled in nonpublic schools. In the case of consumable materials, title and



possession may be surrendered to the student; in the case of reusable materials, title remains in the public school district. Controls are present in the statute to equalize the benefits between the public and nonpublic school systems: the cost for the instructional materials cannot exceed the statewide average cost for the same materials in the public system. The state then allots the amount of money required directly to the public school district for the purchase or loan of instructional materials by nonpublic school students in that district.

Minnesota Statutes § 123.932 then defines "instructional materials" to include textbooks, books, workbooks, manuals, periodicals, photographs, pictorial or graphic works, transparencies, filmstrips, etc., which are intended for use as implements or sources of study for a given class and which are expected to be available for the individual use of each pupil in such class. The term "includes only such secular, neutral and nonideological instructional materials as are available and are of benefit to Minnesota public school students. . . ."

## 2. The rationale of the three-judge court.

### a. *The standard.*

The three-judge court applied the oft-repeated standard in First Amendment Establishment Clause cases: Whether the statute has a secular legislative purpose; whether its primary effect is one that neither advances nor inhibits religion; and whether it fosters an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U. S. 603 (1971). We do not read appellants' brief in any way as challenging the

standards; they simply disagree with the conclusion reached by the trial court that the statute does not have the primary effect of advancing religion.

That conclusion is eminently correct, however, because it is fully in accord with established case law.

### b. *Textbooks.*

Even though not defined separately in the statute, the trial court considered textbooks distinct from other types of instructional materials. They held the Minnesota statute as to textbooks was "substantially similar" to those statutes approved by the Supreme Court in *Board of Education of Central School District No. 1, et al. v. Allen*, 392 U. S. 236 (1968), and *Meek v. Pittenger*, 421 U. S. 349 (1975). In each case this Court upheld state acts providing for the direct loan of secular textbooks to children in nonpublic schools, which texts were acceptable for use in the public school system. Premised largely on *Everson v. Board of Education*, 330 U. S. 1 (1947), this Court in each case compared the loan of textbooks to other secular and nonideological services unrelated to any religious function of the nonpublic school, and concluded there was no Establishment Clause violation.

The *Allen* case is directly on point. There, local school boards were required to purchase textbooks and loan them free "to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law." The texts are those "designated for use in any public, elementary or secondary schools of the state or are approved



by any boards of education" and which "a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends." New York Education Law, § 701, quoted at 392 U. S. 239.

Appellants attempt to read *Allen* as requiring an elaborate screening process on the part of the state to ensure secular content in the texts (Brief, 11). That fact is simply not present in *Allen*. What was required was that the texts either (1) be designated for use in a public school, or (2) be approved by any boards of education, trustees or school authorities. That same assurance of secular content is guaranteed under the Minnesota Act in three ways: (1) the statute itself requires that the texts be "secular, neutral and nonideological" and thus suitable for use in the public schools; (2) except in a few isolated cases involving administrative expediency, the public school authorities order the textbooks and hence know of their secular content; (3) the state Department of Education has policed the operation of the Act and has encountered no material under the program which was *not* secular, neutral and nonideological. (See Affidavit of Rosemary Sommerville, Supplemental Appendix 22-24.)

In addition, there is an assumption, discussed in *Allen* and not rebutted here, that public school administrators are honestly discharging their duties.

Absent evidence, we cannot assume that school authorities, who constantly face the same problem in selecting textbooks for use in the public schools, are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law.

392 U. S. at 245.

No elaborate prior screening process was present in *Cochran v. Board of Education*, 281 U. S. 370 (1930), and yet this Court upheld Louisiana's Act providing for the loan of secular textbooks to nonpublic school students in light of a Fourteenth Amendment challenge.

In short, the Minnesota Act is substantially similar to the statute approved in *Allen*. The Act *does* ensure secularity of content and no evidence was presented to the trial court upon which to base an argument that sectarian textbooks have crept into the operation of the statute.

Little need be said about the textbook provisions of *Meek v. Pittenger*, *supra*. Although there were some differences in the mechanics of the Pennsylvania Act in question, including antecedent approval of the texts by public school officials, this Court held the two programs to be "constitutionally indistinguishable." 421 U. S. at 359. The basis of the Court's reasoning can be seen in the following quotation:

Like the New York program, the textbook provisions of Act 195 extend to all schoolchildren the benefits of Pennsylvania's well-established policy of lending textbooks free of charge to elementary and secondary school students. As in *Allen*, Act 195 provides that the textbooks are to be lent directly to the student, not to the nonpublic school itself, although, again as in *Allen*, the administrative practice is to have student requests for the books filed initially with the nonpublic school and to have the school authorities prepare collective summaries of these requests which they forward to the appropriate public officials. . . . Thus, the financial benefit of Pennsylvania's textbook program, like New York's, is to parents and children, not to the nonpublic schools.

421 U. S. at 360, 361.

In short, the textbook provisions of the Minnesota Act are not materially different from those approved in either of these prior decisions, and hence no substantial federal question is presented.<sup>1</sup>

Appellants have asserted highly artificial objections to the textbook program under the entanglement aspect of the test (Brief, 15-17). Although "entanglement" was not articulated as an element of the test at the time of *Allen*, it was at the time of *Meek*, and presented no difficulties for that decision. Here there is no interference by the state in religious affairs. The texts are selected by the students and their teachers and the state determines whether or not the requested texts are available for use by public school students. The state then approves or disapproves the texts. There is no analysis by the state of teaching methods, religiosity or beliefs. The state is simply approving a textbook on the basis that the same text is available for use in the public system. There is no necessity for state surveillance and no further interface between church and state. No entanglement is present.

c. *Other instructional materials.*

The intent of the Minnesota legislature in enacting this Act was to *equalize* educational benefits and opportu-

<sup>1</sup> The textbook provisions voided in *Public Funds for Public Schools of New Jersey v. Marburger*, 358 F. Supp. 29, aff'd, 417 U.S. 961 (1974), were entirely different from those under the Minnesota Act in that the reimbursement was not extended to parents of all children, only nonpublic school parents. In Minnesota, all children receive free textbooks, under either the Act in question for nonpublic school students or under Minnesota Statutes § 123.35, Subd. 10, for public school students.

nities as between the public system and the nonpublic system. Minnesota Statutes § 123.931. This intent is a fulfillment of its obligation to ensure that *all* Minnesota school children receive a quality education. Minnesota Statutes § 120.10.

In Minnesota, public school districts are prohibited from charging fees for similar nontextbook instructional materials. Minnesota Statutes § 120.74, Subd. 1. Thus in the public sector *both* textbooks and instructional materials are available to students free of charge for their individual use. The statute under consideration merely extends similar benefits to the nonpublic sector.

The trial court analyzed the other instructional materials as being different in kind than textbooks, but not different in statutory treatment. Thus they are requested by nonpublic school students, they are loaned directly to the students, and title considerations are the same. In addition to these mechanical considerations, the "standards for ensuring the secular nature and use of the materials, and the cost-per-pupil method of setting a ceiling on benefits, are the same as those that apply to the textbook loans." (A. 12). Thus the rationale of *Allen* and the textbook section of *Meek* are fully applicable.

What has occurred in recent years is simply a realization among school authorities that good teaching requires not only a textbook but other items of individual use, such as workbooks, periodicals, graphic works and filmstrips. These are readily available and used constantly in the public school system. That is why, in attempting to equalize benefits, the loan provisions were not limited to standard textbooks, but include "instructional materials." The law

is simply keeping in tune with current effective teaching methods.

The Minnesota Act is clearly different from the instructional materials section of the Pennsylvania law that was voided in *Meek v. Pittenger, supra*. Here the loan of materials is directly to the students and is limited to those materials suitable for individual use. The reverse was the case in *Meek*, which caused the Court to conclude that there was a direct flow of financial assistance from the state to the nonpublic schools involved. The Court was quite explicit in this distinction:

Although textbooks are lent only to students, Act 195 authorized the loan of instructional material and equipment *directly to qualifying nonpublic elementary and secondary schools* in the Commonwealth. The appellants assert that such *direct aid* to Pennsylvania's nonpublic schools, including church-related institutions, constitutes an impermissible establishment of religion.

• • •

But we agree with the appellants that the *direct loan* of instructional material and equipment has the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefitting from the Act.

421 U. S. at 362, 363.

(Emphasis supplied.)

Not only were the schools the direct recipients of aid in *Meek*, but the aid was quite substantial, which seemed to cause concern for the Court. See 421 U. S. at 366. The Minnesota Act, on the other hand, has definite cost limita-

tions which limit assistance for both textbook and other instructional materials to about \$45 per student in fiscal year 1976 or a total of about \$4 million. (Affidavit of Rosemary Sommerville, Supplemental Appendix 20.)

Appellants raise the old argument that indirect assistance to students has the effect of aiding the institution because it relieves the institution of a possible economic burden (Brief, 14). Hence they convert the *primary* effect test into an *incidental* effect test. We thought this argument was put to rest in *Roemer v. Board of Public Works of Maryland*, — U. S. —, 96 S. Ct. 2337 (1976). Certainly *Norwood v. Harrison*, 413 U. S. 455 (1973), is no authority for appellants' assertion. The Court there recognized the application of the very arguments respondents are here asserting:

Religious schools "pursue two goals, religious instruction and secular education." *Board of Education v. Allen, supra*, at 245. And, where carefully limited so as to avoid the prohibitions of the "effect" and "entanglement" tests, States may assist church-related schools in performing their secular functions, *Committee for Public Education v. Nyquist, post*, at 774, 775; *Levitt v. Committee for Public Education, post*, at 481, not only because the States have a substantial interest in the quality of education being provided by private schools, see *Cochran v. Louisiana Board of Education*, 281 U. S. 370, 375 (1930), but more importantly because assistance properly confined to the secular functions of sectarian schools does not substantially promote the readily identifiable religious mission of those schools and it does not interfere with the free exercise rights of others.

413 U. S. at 468.



The Court in *Norwood* voided the state statute because the schools followed an avowed discriminatory admissions policy which could not be isolated from the legitimate educational functions also performed. This Court said:

However narrow may be the channel of permissible state aid to sectarian schools, *Nyquist, supra*; *Levitt, supra*, it permits a greater degree of state assistance than may be given to private schools which engage in discriminatory practices that would be unlawful in a public school system.

413 U. S. at 470.

Thus, the trial court's recognition of permissible state assistance to the secular aspect of education and the channeling of that assistance to parents and children rather than schools, is totally supported by prior decisions of this Court.

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### CONCLUSION

Defendant Intervenor-Respondents respectfully submit that this case does not warrant review by this Court. The three-judge court merely applied established precedent to a statute and set of facts substantially similar to that contained in prior case law. The Court should grant the motion to either dismiss the appeal or affirm the judgment below.

Respectfully submitted,  
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**SUPPLEMENTAL APPENDIX**

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION

Minnesota Civil Liberties Union, et al.,

*Plaintiffs,*

vs.

Howard Casmey, et al.,

*Defendants.*

**C O M P L A I N T**

(File No. 3-76-8)

**RELIEF SOUGHT:**

1. Declare Chapter 396 of Laws of Minnesota 1975 unconstitutional;
2. Declare the regulations promulgated by the Minnesota State Board of Education pursuant to Chapter 396 unconstitutional;
3. Enjoin James Lord, State Treasurer, from spending any State funds under the Statute.

**C O M P L A I N T**

**JURISDICTION**

1. This is a civil action brought by the plaintiffs, on their own behalf, and on behalf of all others similarly situated, for a temporary and permanent injunction against the allocation and use of funds of the State of Minnesota, to finance the operations of schools owned and controlled by religious organizations and organized for and

engaged in the practice, propogation and teaching of religion and to declare such use violative of the First and Fourteenth Amendments to the United States Constitution.

2. Jurisdiction is conferred in this Court pursuant to Title 28, U. S. C., Sections 1343 (3), 2201, 2202, 2281, 2284 and Title 42 U. S. C. § 1983.

3. Plaintiffs request that a District Court of three Judges be convened in accordance with the provisions of Title 28, U. S. C., § 2281 and § 2284. Such a Court is required for the hearing and determination of this action since relief is sought to restrain State officers or officials from the enforcement of a statewide statute that allegedly conflicts with the federal Constitution. Plaintiffs seek to enjoin the defendants from using funds of the State of Minnesota to finance the operations of schools owned and controlled by religious organizations and organized for and engaged in the practice, propogation and teaching of religion. Defendants are about to take such action pursuant to Chapter 396, Laws of Minnesota, 1975, and regulations adopted pursuant thereto by the Minnesota State Board of Education members of which are defendants herein, which plaintiffs contend is a law respecting an establishment of religion in violation of the First and Fourteenth Amendments of the United States Constitution. Thus, a three Judge Court would need to decide the claims raised by the plaintiffs.

4. Each of the individual plaintiffs is a citizen of the United States and a resident of the State of Minnesota. Each pays various taxes in and to the State of Minnesota.

5. Each of the organizational plaintiffs are organizations which are interested in maintaining the separation

of Church and State, as well as the quality and existence of the public schools of the State of Minnesota and each have members who are residents and taxpayers of the State of Minnesota.

6. Defendant Howard Casmey is the Commissioner of Education of the State of Minnesota and is sued in such capacity. Defendant James Lord is the Treasurer of the State of Minnesota and is sued in that capacity. Defendants Dorothea Chelgren, David C. Brandon, Henry J. Bromelkamp, Daniel F. Burton, Lorin A. Gasterland, Erling O. Johnson, Ruth A. Myers, Louis R. Smerling, and Henry G. Tweten are members of the State Board of Education of the State of Minnesota, and they are sued in that capacity.

#### FACTUAL ALLEGATION

7. On June 4, 1975, the Governor of Minnesota signed into law Chapter 396, Laws of Minnesota, 1975, providing for the payment to public school districts or intermediary units of tax-raised funds to pay for auxiliary services provided by them to nonpublic schools, and providing for the purchase, with tax-raised funds, of textbooks, instructional equipment and instructional materials to be loaned to and used in nonpublic schools.

8. Subsequent thereto and at the direction and behest of the Governor of the State of Minnesota, the defendant members of the State School Board, over a period of months, held numerous hearings regarding the adoption of regulations pursuant to said Statute, but excluding certain sections thereof. Said hearings were attended and partici-

pated in by various representatives of religious and religious educational organizations.

9. Subsequent thereto, said defendant members of the Board of Education of the State of Minnesota did adopt Chapter 37 of the Regulations of the State Board of Education authorizing the expenditure of funds pursuant to Chapter 396 of Laws of Minnesota, 1975 for the purchase of textbooks and auxiliary materials.

10. Plaintiffs are informed and verily believe that the funds to be allocated thereunder on a per pupil basis will exceed in numerous instances the per pupil allocation of funds for similar services to be provided for students in the public schools in various districts within the State of Minnesota.

11. Plaintiffs are informed and verily believe that said statute and regulations will require numerous administrative decisions and actions by the State Board of Education as well as various local school boards and administrators regarding the allocation of funds and the purchase of material which will necessarily entangle said officials in the affairs and policies of the private and parochial schools whose students are to receive the goods and materials described therein.

12. Chapter 396, Laws of Minnesota, 1975 authorizes and directs payments from state funds to public school districts or intermediary units, which are required to provide books, equipment, materials and services to schools which:

- A. Are controlled by churches or religious organizations;



S. A. 5

- B. Have as their purpose the teaching, propogation and promotion of a particular religious faith;
  - C. Conduct their operations, curriculums and programs to fulfill that purpose;
  - D. Require attendance in theology and religious doctrine;
  - E. Limit admission on the basis of religion;
  - F. Require attendance at or participation in religious worship;
  - G. Are an integral part of the religious mission of the sponsoring church;
  - H. Have as a substantial or dominant purpose the inculcation of religious values;
  - I. Impose religious restriction on what the faculty may teach.
13. The plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless a preliminary and permanent injunction is granted.

CAUSE OF ACTION

14. Chapter 396, Laws of Minnesota 1975 and the regulations adopted pursuant thereto, is a law respecting an establishment of religion in violation of the First Amendment of the United States Constitution in that it:
- A. Constitutes governmental financing and subsidizing of schools which are controlled by religious bodies, organized for and engaged in the practice, propogation and teaching of religion;

S. A. 6

- B. Constitutes governmental action whose purpose and primary effect is to advance religion;
- C. Gives rise to an excessive governmental involvement in and entanglement with religion;
- D. Gives rise to and intensifies political fragmentation and divisiveness along religious lines.

PRAYER FOR RELIEF

Plaintiffs pray that the following relief be granted:

- A. Chapter 396, Laws of Minnesota, 1975 be declared unconstitutional because it is a law respecting establishment of religion in violation of the First Amendment and the Fourteenth Amendment to the United States Constitution;
- B. That defendants, James Lord and Howard Casmey, be enjoined from approving or paying any funds of the State of Minnesota pursuant to Chapter 396, Laws of Minnesota, 1975, and the regulations adopted pursuant thereto;
- C. That defendant members of the State Board of Education be enjoined from promulgating any further rules or regulations for the administration of Chapter 396, and that the rules and regulations already adopted pursuant thereto be declared unconstitutional.
- D. That a preliminary injunction, pending the trial of the issues, be granted to the plaintiffs against the defendants for the relief sought herein.

E. That the plaintiffs be granted such other and further relief as the Court may deem just and proper herein.

/s/ William I. Kampf  
Attorney for Plaintiffs  
310 Empire Building  
Saint Paul, Minnesota 55101  
227-8209

Of Counsel:

Randall Tighe  
Minnesota Civil Liberties Union

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JOINT ANSWER

(Civil Action File No. 3-76-8)

Defendants, for their Answer to the Plaintiffs' Complaint herein, admit, deny, and allege as follows:

1. Admit that this is a civil action brought by the plaintiffs for a temporary and permanent injunction against the allocation and use of certain funds of the State of Minnesota and to declare such use violative of the First and Fourteenth Amendments to the United States Constitution; deny the remaining allegations contained in paragraph 1 of the complaint.

2. Deny the allegations contained in paragraph 2 of the complaint.

3. Admit that plaintiffs request the convention of a three-judge court; affirmatively allege that a three-judge court is not required to adjudicate this matter; deny the remaining allegations contained in paragraph 3 of the complaint.

4. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 4 and 5 of the complaint.

5. Admit the allegations contained in paragraph 6 of the complaint.

6. Admit that on June 4, 1975, the Governor of Minnesota signed into law Minn. Laws 1975, ch. 396; to the extent the allegations contained in paragraph 7 of the complaint purport to explain provisions of Minn. Laws 1975, ch. 396, defendants refer the Court to the official text thereof.

7. Deny that the defendant members of the State Board of Education held numerous hearings at the direction and behest of the Governor of the State of Minnesota; admit the remaining allegations contained in paragraph 8 of the complaint.

8. Admit that defendant members of the State Board of Education did adopt Chapter 37 of the Regulations of the State Board of Education; to the extent that the allegations of paragraph 9 of the complaint purport to explain provisions of said Chapter 37, defendants refer the Court to the official text thereof, a true and correct copy of which is attached hereto as Exhibit "A".

9. Deny the allegations contained in paragraphs 10, 11, 12, 13 and 14 of the complaint.

10. Except as expressly admitted, denied, or otherwise qualified hereinabove, deny each and every allegation, matter, fact, and thing contained in the complaint.

SEPARATE DEFENSES

11. Allege that the Court lacks jurisdiction of the subject matter of this action.

12. Allege that the complaint fails to state a claim upon which relief can be granted.

13. Allege that this action is not ripe for adjudication.

14. Allege that the Court should abstain from hearing this action.

15. Allege that plaintiffs have failed to exhaust their legislative remedies.

WHEREFORE, defendants pray that plaintiffs take nothing by their complaint, that plaintiffs' complaint be dismissed, and that defendants be awarded their costs and disbursements herein.

Dated: February 3, 1976.

Warren Spannaus  
Attorney General  
State of Minnesota

Richard G. Mark  
Assistant Solicitor General

James P. Gerlach  
Special Assistant Attorney General

By /s/ Michael J. Bradley  
Special Assistant Attorney General

And /s/ Mark B. Levinger  
Special Assistant Attorney General

303 Capitol Square Building  
550 Cedar Street  
St. Paul, Minnesota 55101  
Telephone: (612) 296-3301

*Attorneys for Defendants*

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION

(Civil File No. 3-76-8)

Minnesota Civil Liberties Union, Americans United for Separation of Church and State, Minnesota Education Association, Minnesota Association of Secondary School Principals, Minnesota Association of School Administrators, Minnesota Congress of Parents, Teachers and Students, Minnesota Federation of Teachers, Matthew Stark, Kathleen Hauser, Donald K. Krause, individually and on behalf of the taxpayers of the State of Minnesota,  
*Plaintiffs,*

vs.

Howard Casmey, Commissioner of Education of the State of Minnesota, James Lord, Minnesota State Treasurer, Dorothea Chelgren, David C. Brandon, Henry J. Bromelkamp, Daniel F. Burton, Lorin A. Gasterland, Erling O. Johnson, Ruth A. Myers, Louis R. Smerling, Henry G. Tweten, as members of the State Board of Education of the State of Minnesota,

*Defendants,*

and

David and Julaine Wachholz, individually, and Amy, Michael and Laurel Wachholz, minor children, by their parents and natural guardians, David and Julaine Wachholz; James P. Larkin, individually, and Ann, Matthew, Thomas, Mary, Cecilia, Joan, Eileen, Gregory, John and Margaret Larkin, minor children, by their parent and natural guardian, James P. Larkin; Willis Weiberdink, individually, and Joan, Jan, and Wesley Weiberdink, minor children, by their parent and natural guardian, Willis Weiberdink; Robert W. and Rosemary Geist, individually, and Robert W., Jr., Rosemary, Christopher, and Harry Geist, minor children, by their parents and natural guardians, Robert W. and Rosemary Geist,

*Applicants for Intervention.*



**ANSWER OF INTERVENOR DEFENDANTS  
DAVID AND JULAINE WACHHOLZ, ET AL.,**

Come now Intervenor Defendants David and Julaine Wachholz, et al., and for their Answer to the Complaint of Plaintiffs herein, state and allege as follows:

**IDENTIFICATION OF INTERVENORS**

David and Julaine Wachholz, James P. Larkin, Willis Weiberdink and Robert W. and Rosemary Geist are residents and taxpayers of the State of Minnesota, and being parents of minor children, enrolled in nonpublic schools in the State of Minnesota, are the recipients of state assistance in the form of instructional materials, equipment and auxiliary services pursuant to Chapter 396 of the Laws of Minnesota, 1975.

Amy, Michael and Laurel Wachholz, through their parents and natural guardians, David and Julaine Wachholz, Ann, Matthew, Thomas, Mary, Cecelia, Joan, Eileen, Gregory, John and Margaret Larkin, through their parent and natural guardian James P. Larkin, Joan, Jan and Wesley Weiberdink, through their parent and natural guardian, Willis Weiberdink, and Robert W., Jr., Rosemary, Christopher and Harry Geist, through their parents and natural guardians, Robert W. and Rosemary Geist, are minor children, are enrolled in nonpublic schools in the State of Minnesota and requests have been made by or on behalf of these students for state assistance in the form of the loan of instructional materials for the current year from the local public school district in accordance with Chapter 396 of the Laws of Minnesota, 1975. These same students expect in the future to make requests for the loan of equipment and the use of auxiliary services from their local pub-

lic school district, also in accordance with Chapter 396 of the Laws of Minnesota, 1975.

**FIRST DEFENSE**

The Complaint fails to state a claim upon which relief may be granted.

**SECOND DEFENSE**

The Court lacks subject matter jurisdiction.

**THIRD DEFENSE**

The action is currently not ripe for adjudication.

**FOURTH DEFENSE**

The Court should abstain from proceeding further in this matter.

**FIFTH DEFENSE**

The organizational Plaintiffs have no standing to maintain this action.

**SIXTH DEFENSE**

1. Deny each and every factual assertion and legal conclusion contained in the Complaint, except that which is specifically admitted or otherwise qualified herein.

2. As to paragraph 1 of the Complaint, admit only that this is a civil action brought by the Plaintiffs for a temporary and permanent injunction against the allocation and use of funds of the State of Minnesota; deny the remainder of said paragraph.

3. Deny paragraph 2 of the Complaint.

4. As to paragraph 3 of the Complaint, admit only that Plaintiffs are requesting that a three-judge court be convened pursuant to 28 U. S. C. Sections 2281 and 2284; deny the remainder of said paragraph.

5. State that they are without information or belief as to the truth or falsity of paragraph 4 of the Complaint, and therefore deny the same.

6. State that they are without information or belief as to the truth or falsity of paragraph 5 of the Complaint, and therefore deny the same; state further that even if the allegations and factual assertions contained in paragraph 5 are true, that said allegations and factual assertions do not confer standing on the organizational Plaintiffs.

7. Admit paragraph 6 of the Complaint.

8. As to paragraph 7 of the Complaint, admit only that on June 4, 1975, the Governor of the State of Minnesota signed into law Chapter 396 of the Laws of Minnesota, 1975; refer the court to the official text of said act as to its contents.

9. As to paragraph 8 of the Complaint, admit only that the Minnesota Department of Education (not the State School Board or its individual members), as a Minnesota state agency within the meaning of the State Administrative Procedures Act, held public hearings on proposed rules and regulations to implement Chapter 396, Laws of Minnesota, 1975; deny the remainder of said paragraph.

10. As to paragraph 9 of the Complaint, admit only that the Minnesota Department of Education has adopted

certain rules and regulations to implement said statute, referred to as Chapter 37, E. D. U. 740-759, that said regulations pertain only to the instructional materials sections of Chapter 396; allege further that said regulations have been approved as to form and legality by the Minnesota Attorney General, and have been filed for record with the Minnesota Secretary of State; state that the court is referred to the official text of said rules and regulations; deny the remainder of said paragraph.

11. Deny paragraphs 10, 11, 12, 13, and 14 of the complaint.

WHEREFORE, Intervenor Defendants David and Julaine Wachholz, et al., pray that the Complaint be dismissed and that said Chapter 396, Laws of Minnesota, 1975, be declared constitutional in all respects, and that Defendants be awarded their costs and disbursements herein.

BRIGGS AND MORGAN

By JOHN R. KENEFICK

*Attorneys for Intervenor-Defendants*

W-2200 First National Bank Bldg.  
St. Paul, Minnesota 55101  
291-1215

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UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION

(Civil Action File No. 3-76-8)

Minnesota Civil Liberties Union, Americans United for Separation of Church and State, Minnesota Education Association, Minnesota Association of Secondary School Principals, Minnesota Association of School Administrators, Minnesota Congress of Parents, Teachers and Students, Minnesota Federation of Teachers, Matthew Stark, Kathleen Hauser, Donald K. Krause, individually and on behalf of the taxpayers of the State of Minnesota,

*Plaintiffs,*

vs.

Howard Casmey, Commissioner of Education of the State of Minnesota, James Lord, Minnesota State Treasurer, Dorothea Chelgren, David C. Brandon, Henry J. Bromelkamp, Daniel F. Burton, Lorin A. Gasterland, Erling O. Johnson, Ruth A. Myers, Louis R. Smerling, Henry G. Tweten, as members of the State Board of Education of the State of Minnesota,

*Defendants,*

and

Lisa Garcia, Christine Garcia and Julie Anne Garcia, minors, by their father and mother and natural guardians, Ernest Garcia and Lupe Garcia, and Ernest Garcia and Lupe Garcia, individually; Robert E. Slater, III, Joseph F. Slater, Susan C. Slater, Thomas S. Slater, Timothy P. Slater, Sheila M. Slater, and Shannon C. Slater, minors, by their father and natural guardian, Robert E. Slater, Jr., and Robert E. Slater, Jr., individually; Donna Wheaton, a minor, by her mother and natural guardian, Emma Hilliard, and Emma Hilliard, individually; and Leigh Ann Spears and Lisa Spears, minors, by their father and natural guardian, William Spears, and William Spears, individually,

*Defendant Intervenor.*

ANSWER OF DEFENDANT INTERVENORS  
LISA GARCIA, ET AL.

Defendant Intervenor, Lisa Garcia, et al., for their joint and separate answer to plaintiffs' complaint, state and allege:

1. That Defendant Intervenor are entitled to benefits provided by Chapter 396, Laws of Minnesota 1975, pursuant to proper applications made to proper administrative agencies for one or more of the educational aids contemplated by the Act.

(a) Ernest Garcia and Lupe Garcia, husband and wife, are taxpayers of the State of Minnesota, residents of St. Paul, Minnesota, and parents and natural guardians of Lisa Garcia, who is enrolled in Grade 6, Project Discovery, St. Peter Claver School, St. Paul, Minnesota, Christine Garcia, who is enrolled in Grade 3, Project Discovery, Cathedral Grade School, St. Paul, Minnesota, and Julie Anne Garcia, who is enrolled in Grade 1, Project Discovery, Cathedral Grade School, St. Paul, Minnesota.

(b) Robert E. Slater, Jr. is a taxpayer of the State of Minnesota, a resident of St. Paul, Minnesota, and the father and natural guardian of Robert E. Slater, III, who is enrolled in Grade 11, St. Thomas Academy, Mendota Heights, Minnesota, Joseph F. Slater, who is enrolled in Grade 10, St. Thomas Academy, Mendota Heights, Minnesota, Susan C. Slater, who is enrolled in Grade 9, Derham Hall, St. Paul, Minnesota, Thomas S. Slater, who is enrolled in Grade 8, St. Mark's School, St. Paul Minnesota, Timothy P. Slater, who is enrolled in Grade 6, St. Mark's School,



St. Paul, Minnesota, Sheila M. Slater, who is enrolled in Grade 4, St. Mark's School, St. Paul, Minnesota, and Shannon C. Slater, who is enrolled in Grade 2, St. Mark's School, St. Paul, Minnesota.

(c) Emma Hilliard is a taxpayer of the State of Minnesota, a resident of St. Paul, Minnesota, and the mother and natural guardian of Donna Wheaton, who is enrolled in Grade 3, Project Discovery, Cathedral Grade School, St. Paul, Minnesota.

(d) William Spears is a taxpayer of the State of Minnesota, a resident of St. Paul, Minnesota, and the father and natural guardian of Leigh Ann Spears, who is enrolled in Grade 4, Project Discovery, Cathedral Grade School, St. Paul, Minnesota, and Lisa Spears, who is enrolled in Grade 1, Project Discovery, Cathedral Grade School, St. Paul, Minnesota.

2. Except as hereinafter expressly admitted, modified, qualified or otherwise answered, defendant intervenors deny each allegation, statement and matter in the complaint.

3. Admit that this is a civil action for declaratory and injunctive relief.

4. Admit that plaintiffs have requested a three-judge panel to hear this action.

5. Admit the allegations of Paragraph 6 of the complaint.

6. Allege that defendant intervenors are without sufficient knowledge or information as to the truth or accuracy of the allegations of Paragraphs 4 and 5 of the complaint,

and therefore, deny the same and put plaintiffs to their strict burden of proof thereof.

7. Specifically deny that this action is properly brought as a class action and further deny that plaintiffs are properly representative of the class referred to in the complaint.

8. Specifically deny that the court has jurisdiction over this action.

9. Specifically deny that a three-judge panel is necessary or proper in this action.

10. With respect to Paragraphs 7 and 9 of the complaint, defendant intervenors refer to the official texts of the statute and regulations mentioned therein and allege that said statute and regulations speak for themselves.

#### SEPARATE DEFENSES

11. The complaint fails to state a claim upon which relief can be granted.

12. The organizational plaintiffs named in the complaint lack standing to sue.

13. The issues raised by the complaint are not ripe for judicial determination.

14. The federal court should abstain from hearing this action until the state courts have had an opportunity to determine the issues raised therein.

WHEREFORE, Defendant Intervenor, and each of them, pray that the following relief be granted:

1. That the court declare Chapter 396, Laws of Minnesota 1975, and the regulations promulgated pursuant thereto, to be constitutional.
2. That the action in all other respects be dismissed.
3. That Defendant Intervenor be awarded their costs and disbursements herein.
4. That the court award such additional relief as may be necessary and proper.

Meier, Kennedy & Quinn  
By: /s/ Timothy P. Quinn  
and /s/ Gordon W. Shumaker  
*Attorneys for Intervenor,  
Lisa Garcia, et al.*  
430 Minnesota Building  
St. Paul, Minnesota 55101  
Telephone: 226-8844

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UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION

MINNESOTA CIVIL LIBERTIES UNION, ET AL.,  
*Plaintiffs,*

vs.

HOWARD CASMEY, COMMISSIONER OF EDUCATION OF THE STATE OF MINNESOTA, ET AL.,

*Defendants,*

and

LISA GARCIA, ET AL.; DAVID AND JULAINE WACHHOLZ, ET AL.,

*Intervenor.*

AFFIDAVIT OF ROSEMARY A. SOMMERVILLE

ROSEMARY A. SOMMERVILLE, being first duly sworn, deposes and says as follows:

1. I am currently and have been since February 3, 1976, the consultant for Nonpublic Pupil Aid for the Minnesota Department of Education. My duties include the administration of Minn. Stat. §§ 123.931-123.937 (Supp. 1975) (hereinafter "Nonpublic Pupil Aid") for the Department of Education.

2. A review of the files and records in my possession indicates that:

(a) Over 70,000 Minnesota nonpublic school pupils will receive Nonpublic Pupil Aid during the fiscal year ending June 30, 1976.

(b) During the fiscal year ending June 30, 1976, the State of Minnesota will expend approximately \$4.15 million, excluding administrative costs, pursuant to Minn. Stat. §§ 123.931-123.937 (Supp. 1975). As of May 14, 1976, approximately \$1.14 million, or 27%, of the total amount will have been disbursed by the State.

(c) On file at the State Department of Education are all applications for Nonpublic Pupil Aid submitted by nonpublic schools on behalf of nonpublic pupils. These applications summarize the individual "Pupil Request Form" (copy included as the last page of "Guidelines" of the State Department of Education) submitted by each pupil to that pupil's nonpublic school indicating whether or not the pupil wishes to participate in the Nonpublic Pupil Aid program. The applications submitted by at least 55 nonpublic schools

reveal that some pupils attending those schools did not indicate a desire to participate in the program. A few examples of such schools follow:

NonPublic School	Total Pupils Enrolled	Pupils Participating
1. St. Austin School, Minneapolis	317	290
2. Immanuel Lutheran, St. Paul	132	120
3. Stewartville Christian School, Stewartville	120	92
4. Minnehaha Academy, Minneapolis	707	525

(d) Nearly 3,500 pupils receiving Nonpublic Pupil Aid during the fiscal year ending June 30, 1976 attend nonpublic schools which are not owned or operated by religiously-affiliated institutions.

3. I have read the foregoing affidavit, know the contents thereof, and the same is true of my own knowledge.

FURTHER AFFIANT SAYETH NOT.

/s/ Rosemary A. Sommerville

Subscribed and sworn to before  
me this 7 day of May, 1976.

/s/ Myrtle A. Benson

Notary Public, Ramsey County, Minnesota.  
My Commission Expires June 14, 1977.

#### AFFIDAVIT OF ROSEMARY SOMMERVILLE

(Civil File No. 3-76-8)

ROSEMARY SOMMERVILLE, being first duly sworn on oath, deposes and says as follows:

1. I am employed by the Department of Education, State of Minnesota, as a consultant for the nonpublic pupil aid program conducted under Minn. Stat. §§ 123.931 to 123.937 (Supp. 1975).

2. Prior to being employed by the Department of Education, I spent four years teaching primarily English and History in Saint Paul and Duluth, and one year as an intern Assistant Principal at Prior Lake.

3. A review of the files and records in my possession indicates that:

(a) for the 1975-76 school year, 163 of the 440 public school districts have nonpublic pupils within their districts that participated in the nonpublic pupil aid program.

(b) Within the 163 public school districts there were 389 nonpublic schools where nonpublic pupils participated in the aid program.

4. During March, April and May of 1976, I visited 23 public school districts and 36 nonpublic schools located within those districts.

5. While the nonpublic schools selected for a visit were chosen at random, the selection process was designed to ensure that the sample included both large and small schools located in both large and small communities. The sample also included a variety of religious affiliations.

6. The procedures followed during the visitations were as follows:



(a) The public and nonpublic schools were given approximately one week's notice of my intention to make a visit.

(b) I first visited the public school and reviewed all invoices pertaining to materials loaned to nonpublic pupils.

(c) In almost all instances I recognized the materials listed on the invoices as being similar to those used in other public school districts.

(d) In those few instances where I did not recognize an item listed on the invoice, I would request an explanation of what the material was from the public school to ensure that the material was secular, neutral, and nonideological.

(e) I also visited the selected nonpublic schools and viewed:

- (i) The forms requesting participation in the program.
- (ii) Any item that had been listed on an invoice that I did not recognize and for which a satisfactory explanation was not provided by the public schools.
- (iii) A sample of the items loaned by the public school to ensure that the items were properly stamped as being the property of the public school district, and to ensure that the items were actually being used by individual non-public pupils.

7. During my visits I encountered no material loaned under the program which was not secular, neutral and non-ideological.

8. I have read the foregoing affidavit, know the contents thereof, and the same is true of my own knowledge.

FURTHER AFFIANT SAYETH NOT.

Dated: September 24, 1976.

/s/ Rosemary Sommerville

Subscribed and sworn to before  
me this.....day of  
September, 1976.

.....  
Notary Public

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